

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Cox Communications Kansas, LLC)	CSR 8222-E, 8223-E, 8224-E, 8225-E,
)	8226-E, 8227-E, 8228-E
Petitions for Determination of Effective)	
Competition in various Kansas Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 2010

Released: May 7, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Cox Communications Kansas, LLC, hereinafter referred to as “Petitioner,” has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(1), 76.905(b)(2), 76.905(b)(4) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). Petitioner additionally claims to be exempt from cable rate regulation in the Communities listed on Attachment B because the Petitioner serves fewer than 30 percent of the households in the franchise area. Petitioner finally claims that it is exempt from cable rate regulation in the Communities listed on Attachment C because of the competing service provided by AT&T Kansas, hereinafter referred to as “Competitor.” The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment (A, B, and C).

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(2).

³47 C.F.R. § 76.906.

⁴See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁶ this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁷

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁸ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹¹ and is supported in the petitions with copies of channel lineups for both DIRECTV and Dish.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.¹⁴ Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from

⁶47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷47 C.F.R. § 76.905(b)(2)(i).

⁸*See* Petitions at 6.

⁹*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹⁰47 C.F.R. § 76.905(e)(2).

¹¹*See* 47 C.F.R. § 76.905(g). *See also* Petitions at 5.

¹²*See* Petitions at 5 and Exhibit 3.

¹³*See* Petitions at 5-6.

¹⁴*Id.* at 9.

the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code and zip code plus four basis where necessary.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

B. The Low Penetration Test

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.¹⁷ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.¹⁸

10. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities listed on Attachment B. Therefore, the low penetration test is also satisfied as to the Communities.

C. The LEC Test

11. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a local exchange carrier (“LEC”), or its affiliate, offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator¹⁹; this test is otherwise referred to as the “LEC” test.

12. The Commission has stated that the incumbent cable operator must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not completed its build-out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.²⁰ It

¹⁵Petitions at 9-10.

¹⁶Petitions at 10.

¹⁷47 U.S.C. § 543(l)(1)(A).

¹⁸Petitions at 24.

¹⁹See 47 U.S.C. § 543(l)(D).

²⁰See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) (“*Cable Reform Order*”).

is undisputed that the Communities on Attachment C are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming²¹ and is supported in the petitions with copies of channel lineups for Competitor.²² Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities on Attachment C, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.²³

13. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving the Communities on Attachment C has met the LEC test and is subject to effective competition.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Cox Communications Kansas, LLC **ARE GRANTED**.

15. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A, B, and C **IS REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁴

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division, Media Bureau

²¹See 47 C.F.R. § 76.905(g). See also Petitions at 23.

²²See Petitions at 24 and Exhibit 14.

²³See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petitions at 22-23.

²⁴47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8222-E, 8223-E, 8224-E, 8225-E, 8226-E, 8227-E, 8228-E

COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 8222-E</u>				
Dodge City	KS0002	23.08%	9,299	2,146
Garden City	KS0063	19.80%	9,338	1,849
<u>CSR 8223-E</u>				
Great Bend	KS0016	20.55%	6,371	1,309
<u>CSR 8224-E</u>				
Junction City	KS0040	15.72%	9,801	1,541
<u>CSR 8225-E</u>				
Salina City	KS0052 KS0411	17.59%	21,641	3,808
<u>CSR 8226-E</u>				
Arkansas City	KS0007	19.19%	4,855	932
El Dorado	KS0184	19.30%	6,129	1,183
Hutchinson	KS0071	16.87%	16,335	2,756
McPherson	KS0069	15.02%	6,067	911
Pratt	KS0051	18.01%	3,088	556
Winfield	KS0075	17.99%	1,546	926
<u>CSR 8227-E</u>				
Shawnee County	KS0658 KS0341 KS0531 KS0309 KS0532 KS0342 KS0547	20.58%	15,386	3,167

CSR 8228-E

Coffeyville	KS0019	25.65%	4,971	1,275
Iola	KS0037	16.03%	3,013	483
Pittsburg	KS0050	17.70%	7,980	1,412

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8223-E, 8224-E

COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 8223-E</u>				
Pawnee County	KS0468	650	56	8.62%
<u>CSR 8224-E</u>				
Manhattan Pottawatomie County	KS0409	3,217	302	9.39%
Manhattan Riley County	KS0410	3,917	739	18.87%

ATTACHMENT C

CSR 8224-E, 8226-E, 8227-E

COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

Communities CUID(S)**CSR 8224-E**

Manhattan	KS0042
Ogden	KS0032
	KS0415

CSR 8226-E

Andover	KS0156
	KS0642
Augusta	KS0148
Bel Aire	KS0271
Benton	KS0733
Butler County	KS0330
	KS0570
	KS0599
Colwich	KS0760
Derby	KS0127
Eastborough	KS0226
Goddard	KS0296
Haysville	KS0126
Kechi	KS0286
Maize	KS0264
McConnell AFB	KS0307
Mulvane	KS0225
Park City	KS0268
Rose Hill	KS0265
Sedgwick	KS0154
	KS0253
	KS0267
	KS0615
	KS0614
	KS0618
Towanda	KS0313
Valley Center	KS0153
Wichita	KS0080

CSR 8227-E

Auburn	KS0335
Shawnee County	
Berryton	KS0658
Montara	KS0531
Pauline	KS0532

Shawnee	KS0309
Shawnee North	KS0341
Shawnee East	KS0342
Shawnee Southwest	KS0547
Topeka	KS0079